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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 519

LUTHER THOMAS LAMBERT, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

WALTER HARWOOD,
JUDSON HARWOOD,
Nashville Trust Building,
Nashville, Tennessee,
Attorneys for Appellants.

Of Counsel:
HARWOOD, BREEDLOVE AND MITTWEDE,
Nashville Trust Building,
Nashville, Tennessee.

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JURISDICTIONAL STATEMENT

Appellants, Luther Thomas Lambert, Vernon H. Hedgepath, and the NC&StL Railway Employees Job Protection Association, appeal from the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, entered on June 20, 1957, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that substantial questions requiring plenary consideration are presented.

Opinion Below

There was no written opinion issued by the court below. Instead, the District Court filed findings of fact and conclusions of law, which have not been reported. Copies

of the findings of fact and conclusions of law and judgment are attached to the jurisdictional statement filed by appellants, City of Nashville, Tennessee, et al. as Exhibit A, and need not be repeated herein.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1253 and Section 2101 (b).

This suit was brought under 28 U.S.C., Sections 1336 and 2284 by the City of Nashville, Tennessee, to enjoin, set aside and annul an order of the Interstate Commerce Commission, authorizing, among other things, the merger of the Nashville, Chattanooga & St. Louis Railway into the Louisville & Nashville Railroad Company, and the acquisition of direct control by the Atlantic Coast Line Railroad Company of the surviving corporation and indirect control of such corporation by the Atlantic Coast Line Company.

Pursuant to 28 U.S.C. Section 2323, appellants herein, the NC&StL Railway Employees Job Protection Association, and Luther Thomas Lambert and Vernon H. Hedgepath, individually, and as representatives of a class composed of 839 employees of the Nashville, Chattanooga & St. Louis Railway who would be directly affected by the proposed merger, intervened in the suit as intervening plaintiffs. The State of Tennessee, Tennessee Public Service Commission, and Davidson County, Tennessee also intervened as plaintiffs. All plaintiffs alleged invalidity of the order of the Commission on various grounds.[1]

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[1] For convenience, the Nashville, Chattanooga & St. Louis Railway will be referred to as the Tennessee Company, the N. C. & St. L., or the N. & C.; the Louisville & Nashville Railroad Company as the Kentucky Company or the L. & N.; the Atlantic Coast Line Railroad Company as the Coast Line; the Atlantic Coast Line Company as the Connecticut Company; the Interstate Commerce Commission as the I.C.C. or the Commission; and the NC&StL Railway Employees Job Protection Association as the Employee Association.

The complaint, and the intervening complaints of appellants, were filed in the United States District Court for the Middle District of Tennessee at Nashville, presided over by District Judge William E. Miller. On account of illness, Circuit Judge John D. Martin, sitting by designation, issued a temporary restraining order on April 8, 1957.

Although 28 U.S.C. Section 2284 provides that at least one of the two other judges shall be a Circuit Judge, the Chief Judge of the Sixth Circuit designated, to sit with Judge Martin, District Judges Leslie R. Darr and Roy M. Shelbourne for the hearing of the applications for an interlocutory injunction. It was agreed that the hearing would be a final hearing on the merits upon demand for a permanent injunction. After such hearing, the District Court entered findings of fact and conclusions of law on May 24, 1957, and judgment was entered on June 20, 1057, dismissing the complaint and intervening complaints. Notices of appeal were filed by the plaintiff and intervening plaintiffs in the United States District Court for the Middle District of Tennessee, Nashville Division, on July 26, 1957, after the Commission had issued a new order, dated July 10, 1957, fixing August 14, 1957, as the new effective date of its original order.

If it be assumed that the three-judge Court had jurisdiction to dismiss the complaints, the following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Radio Corp. of America* v. *United States* (1950), 341 U.S. 412; *Swift & Co.* v. *United States* (1952), 343 U.S. 373; *Railway Labor Executives Ass'n.* v. *United States* (1950), 339 U.S. 142.

Questions Presented

The following questions are presented by this appeal:[2]

1. (a) Whether under the guise of imposing what are alleged to be (but in actuality are not) liberal protective conditions for the benefit of the carrier employees affected, the Commission may lawfully ignore their interest, or fail to give it proper weight, in determining in the first instance whether a merger is consistent with the public interest as specifically required by Section 5(2)(c) of the Interstate Commerce Act.

(b) Of the two enumerated factors at issue in this cause required by Section 5(2)(c) of the act to be considered in passing upon a merger, whether the Commission is required, or is permitted, to give primary consideration to the factor involving service and a lesser or secondary consideration to the interest of the employees, and then to approve the merger notwithstanding the Commission's affirmative finding that there will be no immediate and direct improvement in the service to the public.

2. (a) Whether the Commisssion may approve a merger of two railroads where its order of approval does not require the fair and equitable arrangement to protect the interests of the railroad employees affectsd contemplated by Section (2)(f) of the Interstate Commerce Act.

(b) Whether the District Court, on review, may lawfully revise or amend an order of the Interstate Commerce Commission; or, whether it is limited to sustaining or setting

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[2] The City of Nashville, Tennessee, State of Tennessee, Tennessee Public Service Commission, and Davidson County, Tennessee, have also filed their notice of appeal and jurisdictional statement with this Court. In the notice of appeal filed on behalf of appellants herein, it was requested that the two appeals be consolidated, or, heard by the Court at the same time. Appellants herein adopt and rely on the questions presented as set forth in the jurisdictional statement of the City of Nashville, et al., in addition to those set forth herein.

aside such order; or to remanding the case to the Commission.

3. Whether the District Court may sustain an order of the Interstate Commerce Commission where the Commission did not have before it at the time the case was decided and therefore did not consider material exhibits to the proceedings which were filed subsequent to the hearing before the Commission pursuant to instructions from the Hearing Examiner.

Statutes Involved

The pertinent portions of the statutes involved in this jurisdictional statement are set forth in Appendix B hereto, including provisions of the Administrative Procedure Act and the Interstate Commerce Act. Other portions of these statutes, as well as different statutes are set forth in detail in Appendix B to the jurisdictional statement of appellants, City of Nashville, et al.

Statement of the Case

By application dated January 28, 1955, the Kentucky Company and the Tennessee Company applied for authority to merge the properties and franchises of the latter into the former for ownership, management and operation. The Connecticut Company and the Coast Line joined in the application because of their control through stock ownership of the Kentucky Company. The application stated that the Kentucky Company controls the Tennessee Company through ownership of 74.9 per cent of its capital stock; that the Coast Line controls the Kentucky Company through ownership of 35.2 per cent of its common capital stock; and that the Connecticut Company controls the Coast Line through ownership of 28.28 per cent of its common and preferred capital stock. It also stated that the Kentucky Company, the Tennessee Company and the Coast Line were

being operated and managed as separate entities. The allegation was also made that approval of the merger would result in a materially improved service to the public.

Hearings were held before an Examiner, who issued a proposed report, dated June 21, 1956, wherein he recommended approval of the application. Various parties filed exceptions to the Examiner's proposed report alleging that numerous errors had been committed by the Examiner. Oral argument was heard by the full Commission, which subsequently issued its report and order, both dated March 1, 1957, approving the merger, to be effective forty days from date. The said report and order, however, were not released and served on the parties until March 13, 1957, and were made effective, therefore, less than thirty days from the date of service.

The complaint, as amended, and the intervening complaints, as amended, challenged the validity of the Commission's order on the various grounds reflected in the "Questions Presented" as set out earlier herein, and as set forth in the jurisdictional statement of the appellants, City of Nashville, Tennessee, et al., heretofore filed with this Court, and upon which these appellants also rely and which they adopt. Answers of the defendants and intervening defendants were duly filed and the case was tried on the record, oral stipulations and statements of counsel in open court, and one exhibit filed by the plaintiff, City of Nashville, Tennessee.

Following the hearing on the merits the District Court did not render an opinion discussing the questions presented by the complaint and intervening complaints (and again presented on appeal by the various appellants). Instead, it filed "Findings of Fact" and "Conclusions of Law." Said conclusions of law are to the effect that the Commission's findings are supported by substantial evi-

dence, and that the errors complained of by the plaintiffs did not constitute prejudicial error.

The District Court refused to approve unconditionally the order of the Commission as issued by the Commission. In its Conclusion of Law No. 11, the Court recites a portion of the statute, 49 U.S.C. Section 5(2)(f), which provides that "As a condition to its approval . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." Presumably the Court felt that the Commission's order, as issued, did not comply with the statute because it stated that its approval of said order was "based upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway shall be protected equally with with those of employees of the Louisville & Nashville Railroad Company as relates to seniority and to other conditions of employment . . ." The uncontradicted testimony of applicants' witnesses is that *all* dismissals and transfers would come from the employees of the Nashville, Chattanooga & St. Louis Railway, rather than from employees of both railroads. In spite of the conclusion of the Court that the Commission's order did not comply with the requirements of Section 5(2)(f), it nevertheless dismissed the complaint and the intervening complaints.

The Questions Presented Are Substantial, Requiring Plenary Consideration

The lives of 839 employees and their immediate families will be directly affected by the Court's decision of this case, and the interpretation of the statutes involved will determine the rights of untold thousands of employees who will be affected by railroad mergers in the years to come.

In order to avoid repetition of a discussion of the questions raised by the appeal of the City of Nashville, Ten-

nesee, et al., and upon which appellants herein also rely, the questions presented hereinabove, and the discussion which is to follow have been confined to those involving the extent and the nature of the consideration which must be given to "the interest of the carrier employees affected" and the other considerations specified in Sections 5(2)(c) and (f), 49 U.S.C., in passing upon mergers and consolidations of carriers.

Question 1

(a) Whether under the guise of imposing what are alleged to be (but in actuality are not) liberal protective conditions for the benefit of the carrier employees affected, the Commission may lawfully ignore their interest, or fail to give it proper weight, in determining in the first instance whether a merger is consistent with the public interest as specifically required by Section 5(2)(c) of the Interstate Commerce Act.

(b) Of the two enumerated factors at issue in this cause required by Section 5(2)(c) of the act to be considered in passing upon a merger, whether the Commission is required, or is permitted, to give primary consideration to the factor involving service and a lesser or secondary consideration to the interest of the employees, and then to approve the merger, notwithstanding the Commission's affirmative finding that there will be no immediate and direct improvement in the service to the public.

While this Court has interpreted Section 5(2)(f) of the act relating to transactions such as the instant one,[3] it has not been called upon to interpret Section 5(2)(c) of the act

[3] *Railway Labor Executives' Ass'n. v. United States*, 339 U.S. 142 (1950).

in the respect here at issue. This section provides that the Commission shall "give weight to the following considerations, among others; (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

In *McLean Trucking Co., Inc. et al.* v. *United States*, (1944) 321 U. S. 67, at page 76, this Court did hold that the "foregoing provisions supply the general statutory standards for guiding the Commission's judgment. . . ." In the *McLean* case only three of the above provisions were at issue, while in the instant case only two are at issue; namely, (1) and (4).

Furthermore, at page 69 of the opinion, the Court pointed out that the employees' bargaining representatives (International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) ultimately supported the application, and at page 88 of the opinion it was specifically noted that the Commission found that the proposed consolidation would result in improved transportation service to the public.

At no place in the Commission's report concerning the instant case, is there any statement or finding that the Commission evaluated the gains or advantages which reasonably may be expected to accrue to the public in point of transportation service and weighed them against the "admitted adverse affect" upon the carrier employees involved. In fact, there is no statement or finding of any kind to indicate that it gave *any* consideration to the "admitted adverse affect" upon the employees in determining whether

the proposed transaction is consistent with the public interest.

This is in sharp contrast to the Commission's previous interpretations of Section 5(2)(c) of the act, as amended, when passing upon other transactions of this kind.

The first case presented to the Commission after the 1940 amendment of the act which required an interpretation of Section 5(2)(c) was the case of *Ft. Worth & D. C. Ry. Co., Lease*, 247 I.C.C. 119. The application in that case was filed *before* the 1940 amendment and was approved by Division 4 of the Commission. Petitions for reopening, rehearing, reconsideration and postponement of the effective date were filed by the interveners, and by order dated August 29, 1940, Division 4 postponed the effective date pending a decision by the full Commission. While these petitions were pending, however, the Transportation Act of 1940 was enacted, which amended Section 5 of the statute and which, *for the very first time*, included "the interest of the carrier employees affected" as a mandatory factor which the Commission must consider in passing upon transactions covered by the act.

In passing upon the case, the full Commission interpreted Section 5(2)(c), as amended, and explained wherein the *present* congressional policy respecting such transactions differs from that existing prior to 1940, and why the changes were made. The full Commission indicated in its decision that, but for the 1940 amendment, it would have affirmed Division 4's approval of the application. However, because of the provisions of the 1940 amendment, the full Commission reversed Division 4 and denied the application, stating: (p. 127)

> "Railroad organization consists of four important and indispensable factors, namely, land, labor, capital and management. High specialization is necessary for

each railroad factor. Whenever expert railroad labor is compelled to readjust and adapt itself to another industry, there is substantial loss to the individuals and to the general public. Congress has recognized this fact and in revising the statute has specifically required us to give consideration to 'the interest of the carrier employees affected.' Heretofore, we have given consideration to the interest of the carrier employees affected to the extent of imposing appropriate conditions in our order of approval. See *Chicago, R.I. & G. Ry. Co.; Trustees Lease*, 233 I.C.C. 21. *We are now specifically required to give consideration to the interest of such employees in determining whether the transaction is consistent with the public interest.* Under the proposed lease the future of any individual employee of the lessor would be uncertain.

"Applicant contends that the proposed transaction is consistent with the public interest because of the savings that would result from the consolidation of shops and the dismissal of employees. Under the amended act it is obvious that the savings would be insignificant during the period in which the employees would be protected by the provisions of our order complying with subparagraph (f). In other words, we are asked to give approval to this transaction based entirely on what the applicant believes will be the situation 4 to 5 years hence.

"Part of the alleged savings can be attained by modification of the reciprocal arrangement between the Burlington and the parties hereto, irrespective of our conclusion herein. The amount of future savings is uncertain and problematical. *No present advantage in the public interest is shown.*" (Emphasis supplied)

Note that because "the future of any individual employee of the lessor would be uncertain" and because "No present advantage in the public interest is shown" the Commission denied the application. In that case, as in the instant case, applicants sought to justify the transaction principally because of savings which would allegedly result from the consolidation, primarily through dismissal of employees.

Since its decision in the *Ft. Worth* case, and prior to the instant case, the Commission has *consistently* held (where the "interest of the carrier employees affected" was an issue raised as grounds for denial of the application) that Section 5(2)(c) requires it to *weigh* the gains or advantages to the public in point of service with the disadvantages to the carrier employees affected, and in every instance that we have found where approval has been given, the Commission has held that (1) gains and advantages would accrue to the public generally, and (2) such gains and advantages *outweighed* the disadvantages to the employees.

In *Oklahoma Ry. Co., Trustees Abandonment* 257 I.C.C. 117, at page 195, the Commission held that "the possible disadvantages to the employees do not outweigh the advantages to the public resulting from carrying out the proposed plan."

In the case of *A. C. Allyn and Company, et al Control; Transcontinental Bus System, Inc.—Control—Continental Bus System, Inc., et al,* 50 M.C.C. 184, the Commission pointed out that of the four specific factors enumerated in Section 5(2)(c), only two were involved (which are the same two which are involved in this case): "(1) the effect of the proposed transaction upon adequate transportation service to the public, * * * and (4) the interest of the carrier employees affected'." It then held that the advantages to be derived by the public generally from the proposed transaction outweighed the disadvantages to the employees.

Similar findings were made in the cases of *Ralph Marcuccilli, et al—Control; Marion Truck Company, Inc.,—Purchase—Harwood Trucking, Inc., and Jaqua Transit Lines, Inc.*, 50 M.C.C. 613, and *Deluxe Motor Stages of Illinois—Lease—Santa Fe Trail Transportation*, 39 M.C.C. 709.

A similar finding in the instant case is conspicuous by its absence. In fact, there is no statement or finding of any kind to indicate that the Commission gave *any* consideration to the "admitted adverse effect" upon the employees in determining whether or not the proposed transaction is consistent with the public interest.

Such a finding is absent in this case because there is absolutely no evidence upon which the Commission could have based a finding that the present gains or advantages to the public generally outweigh the admitted adverse effect this particular transaction will have upon the carrier employees affected. To the contrary, as a result of the admissions on cross-examination of applicants' witnesses (Tr. 123, 249-250, 397-398, 402-405) the Commission was compelled to find:

> "From the record it does not appear that the applicants contemplate that any immediate and direct improvement in service will result from the merger." (Sheet 69, Commission's Report)

In the instant case, the Commission did not overrule its decision in the *Ft. Worth* case, supra, but merely attempted to distinguish it from this case on the *sole* ground that "initial control was to be attained" in that case "by a lease rather than a merger of properties which have been controlled by the dominant company, through stock ownership, for more than 75 years." (Sheet 65, Commission's Report) The act makes no distinction whatever between a merger and a lease—*the act covers any method or device by which control is effectuated.*

Based on this sole basis for distinguishing the two cases, the Commission adopted the identical language of the Examiner (and to which exceptions were taken) as follows:

> "Under these circumstances, the application herein should not be denied because some (839) employees will be adversely affected in the event the merger is consummated. However, in view of the admitted adverse effect upon such employees approval of the application would have, consideration must be given to the protective conditions which should be imposed for their benefit." (Sheet 65, Commission's Report.) (Parenthetical figure added)

The Commission, and the District Court, presumably accepted the applicants' theory or interpretation of the statute to be (as stated in their brief to the District Court, at page 143) that "If the employees receive the protection contemplated by Section 5(2)(f), their interest in the proceeding is at an end."

If such a theory or interpretation of the statute is correct, then there would have been no need or reason for the inclusion of "the interest of the carrier employees affected" as one of the mandatory considerations by which the Commission must be guided in determining whether or not a proposed transaction is consistent with the public interest, because, in that event, Section 5(2)(f) alone would suffice.

It is a cardinal rule of construction, however, that the Court must construe a statute as a whole and, if possible, give meaning to all parts of it. *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208. Furthermore, this Court has already held in the *McLean* case, supra, that the provisions of Section 5(2)(c) must govern the *initial* decision by the Commission as to whether or not a proposed transaction should

be approved or denied. That that holding is correct is further obvious from the fact that Section 5(2)(f) is applicable to railroad employees only, and has no application at all, for example, to mergers of truck lines.

In support of their intrepretation or construction of the statute referred to above, the applicants rely upon this Court's discussion of the legislative history of the Harrington Amendment (Section 5(2)(f), in *Railway Labor Executives' Ass'n.* v. *United States*, 339 U.S. 142. The amendment as originally proposed provided "that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." While the bill was in conference, the Commission stated to Congress that "the proviso, by prohibiting any displacement of employees, goes much too far, ..." We agree. The bill was then changed in conference to its present form.

Applicants contend that the form of the bill as enacted (as Section 5(2)(f)) "completely negatives any possible construction that the discommoding of employees is a ground for denying a proposed consolidation." (Reply to Exceptions, page 75, filed on behalf of applicants)

Such a statement, we submit, is incorrect and is inconsistent with the facts. The bill as originally proposed would have prevented *any* merger or consolidation if *any* adverse effect, however slight, would accrue to the employees, regardless of any improvement in the service to the public which would result. The bill as finally enacted, however, simply provided that the Commission must evaluate the present gains or advantages to the public in point of service as a result of such a transaction, and weigh them against the adverse effect on the employees, *based on the proof in*

each individual case. The *Railway Labor Executives' Ass'n.* case involved an appeal to this Court of the *New Orleans Passenger Terminal Case*, 267 I.C.C. 763, wherein the Commission's interpretation of Section 5(2)(f) was found to have been incorrect.

In that case, the Court was not called upon to interpret Section 5(2)(c) of the act because no one denied that the transaction was consistent with the public interest. To the contrary, all parties, including the employees, conceded that the proposal was in the public interest in view of the numerous present gains to the public as a result thereof.

It is the position of these appellants that where (as here) there is an affirmative finding by the Commission that the proposed transaction will *not* result in any present gain to the public in point of service, and where (as here) there is specific evidence to show the exact extent and nature of the "admitted adverse effect" upon the 839 employees involved, the intent of Congress as expressed in Section 5(2)(c) is that approval of such a transaction must be withheld.

For the foregoing reasons, it is respectfully insisted that the Commission, and the District Court, have incorrectly interpreted Section 5(2)(c) of the act.

The Commission, and the District Court, have further misinterpreted Section 5(2)(c) of the act in another important respect.

In discussing the four enumerated factors specified in Section 5(2)(c), the Commission stated:

> "In administering these provisions we are to be guided *primarily* by consideration for adequacy of transportation, to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities. *New York Central S.*

Corp. v. *U. S.*, 287 U.S. 12; 25. The foregoing are the primary elements affecting the public interest with which the transaction must be consistent." (Sheet 67, Commission's Report) (Emphasis supplied)

Thus, the Commission has decided the instant case on the proposition that, as a matter of law, "the interest of the carrier employees affected" must *always* be subordinated to the consideration involving adequacy of transportation service, irrespective of whether, as here, there is an affirmative finding that there will be no present gains or advantages to the public generally in point of service, and irrespective of the proof with respect to the nature and extent of the "admitted adverse effect" upon the employees.[4] This holding of the Commission is erroneous because it is predicated upon the *New York Central* case, supra, which involved this Court's interpretation and construction of the act as it existed *prior to the 1940 amendment*, which, for the very first time, made the interest of the employees a mandatory consideration in determining whether or not a merger is consistent with the public interest.[5] Furthermore, in the *New York Central* case, the interest of the employees was not at issue.

Appellants herein challenged that holding of the Commission in their intervening complaint (Paragraph 4),

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[4] These appellants in their intervening complaint referred to the failure of the Commission to find from uncontradicted proof the extent of the adverse affect upon dismissed employees of the N. C. & St. L., based upon the uncontradicted proof of earnings in outside industry and its failure to find from other uncontradicted proof that such adverse affect would be permanent. The District Court, erroneously we submit, held that the Commission was not required to make such a finding. This phase of the case will be discussed later here.

[5] The amended act also clarified and restricted the term "adequate transportation" to read "adequate transportation *service*". As indicated earlier herein, the Commission affirmatively found that this merger would not result in any direct and immediate improvement in service.

but the District Court *failed to pass upon that part of said intervening complaint* in its Findings of Fact, Conclusions of Law, or in its final order dismissing the complaints.

Question 2

(a) Whether the Commission may approve a merger of two railroads where its order of approval does not require the fair and equitable arrangement to protect the interests of the railroad employees affected contemplated by Section 5(2)(f) of the Interstate Commerce Act.

(b) Whether the District Court, on review, may lawfully revise or amend an order of the Interstate Commerce Commission; or, whether it is limited to sustaining or setting aside such order, or to remanding the case to the Commission.

The order of the Commission is fatally defective in that it does not provide a fair and equitable arrangement to protect the interest of the 839 employees who will be affected by the merger. Because it did not contain such a fair and equitable arrangement, the District Court would not affirm the order as issued by the Commission. Instead, it approved the order subject to an "express condition" which was apparently designed to afford equal protection to the employees of the N. C. & St. L. but which "express condition", it is submitted, did not cure the defect which the District Court recognized in the Commission's order.

The testimony of 'applicants' witnesses is that all dismissals and transfers would come from the employees of only one of the two railroads to be merged. This testimony is summarized at Sheets 63-64 of the Commission's Report. Appellants herein relied upon this testimony throughout the proceedings before the Commission—in the brief to the Examiner and in the Exceptions to the Exam-

iner's Report, and during oral argument before the Commission. At no time did the applicants deny that all such dismissals and transfers would come from only the one railroad.

Statements made by members of the three-judge District Court during oral argument were to the effect that if the order of the Commission required all dismissals to come from only the N. C. & St. L., substantial justice would not be done, as follows:

> "Judge Martin: Now, frankly, Brother Grubbs, here is what all three of us are concerned with, and that is a substantial justice of the case, and that is that the employees who are bumped off as a result of this merger should not be exclusively the employees of the NC&StL." (Page 184, Transcript of Proceedings before District Court)

Notwithstanding the testimony of the applicants' witnesses recited in the Commission's Report, one member of the Court commented that the *order* of the Commission does not *require* all dismissals to come from only one railroad, as follows:

> "Judge Darr: As I understand, the railroad counsel in open court concedes that this order does not arbitrarily say that all persons who may be employed in the merged railroad who will be discharged will be N&C employees?
>
> "Mr. Grubbs: Absolutely, Your Honor.
>
> "Mr. Harwood: It does not say that they won't be from the N&C either, Your Honor.
>
> "Judge Darr: Well, that's putting it two ways." (Page 193, Transcript of Proceedings before District Court)

That there is nothing in the Commission's order to *prevent* all dismissals from coming from only the N. C. & St. L. employees is indicated from the statement of counsel for the Department of Justice, as follows:

> "Mr. McConnell: If I may come out on this because I had occasion to try to get into it with the Examiner Sunday to find out exactly what happened, and *this order does not purport to do anything about seniority.*" (Page 182, Transcript of Proceedings before District Court) (Emphasis supplied)

The District Court recognized, however, that seniority is one of the most valuable rights the working man has (Transcript 191). One of the judges commented:

> "Judge Darr: (interrupting) When there is a merger, why, it doesn't matter about the size of the company. *The employees should be taken care of according to seniority regardless of which road they were formerly employees.*" (Page 181, Transcript of Proceedings before District Court) (Emphasis supplied)

It was subsequently suggested, however, that the employees would have their unions to protect their seniority rights (Tr. 180, 187).

If the District Court's holding was that the employees may not look to the Court to uphold the law, but must rely on negotiations by their collective bargaining representatives (presumably to the extent of calling a strike if necessary) to secure for them the "fair and equitable arrangement to protect the interests of the railroad employees affected" required by Section 5 (2)(f) as a condition of approval by the Commission, then the Court was clearly in error. The responsibility of upholding the law is in the Courts—not the labor unions.

Counsel for the Commission also took the position that the Commission's order does not purport to say which employees of the two railroads should be retained by the surviving railroad, or under what conditions. Instead, he contended that that was left to the *managerial discretion of the carriers* as limited by their collective bargaining agreements (Tr. 195).

It is submitted that the carriers have already exercised their managerial discretion as indicated by the testimony of their own witnesses' that all dismissals and transfers would come only from the N. C. & St. L. Insofar as the collective bargaining agreements of the L. & N. and the N. C. & St. L. are concerned, none of them were introduced in evidence and were not before the Commission or the District Court.

The only collective bargaining agreement referred to by name in the proceedings is the so-called Washington Job Protection Agreement, which the record shows was executed and entered into by the N. C. & St. L. Railway. Although the N. C. & St. L. was committed to that agreement, the applicants are on record in this case as contending that the 1940 amendment of the act (Section 5(2)(f) *superseded this collective bargaining agreement* (R. 594, 595) and that under the amended act, the Commission now has the duty of prescribing the protective conditions in its order of approval, and which must be complied with notwithstanding the fact that the N. C. & St. L. was committed to the Washington Job Protection Agreement. (R. 278)

Appellants herein recognize that the Commission should not be expected to pass upon each and every individual employee who would be dismissed or retained. They do insist, however, that the terms and conditions of the Commission's order should contain a "fair and equitable arrangement" to protect their interests and which would

preclude the exercise of managerial discretion to the extent that all dismissals would come from the employees of only one of two railroads to be merged, irrespective of their length of service as compared to the length of service of employees of the other railroad.

The Commission's order further does not comply with Section 5(2)(f) in that the protective conditions imposed are wholly inadequate and were made without regard to the fact that the "admitted adverse affect" upon the employees would be *permanent*, and without regard to the *extent* of the adverse affect as measured in dollars and cents, all of which was shown by uncontradicted proof.

Appellants herein alleged in their intervening complaint before the District Court that the Commission had not complied with the Federal Administrative Procedure Act (28 U.S.C. Section 1007) by its failure to consider and to pass upon an exception to the Examiner's Proposed Report, alleging that he failed to find from uncontradicted evidence that the "admitted adverse affect" upon the employees affected would be permanent, or to find from the uncontradicted evidence the extent of such permanent adverse affect. The District Court in its Conclusion of Law No. 7 held that the Commission was not required to make such a finding.

This conclusion of law is clearly erroneous first, because the Commission was required to pass upon the exception; second, because evidence showing the *nature* and *extent* of the adverse affect upon the employees has a direct bearing upon one of the enumerated factors under Section 5(2)(c) which the Commission is required to consider in determining whether or not the transaction is consistent with the public interest, and, third, if the transaction is found to be consistent with the public interest, then such evidence has a direct bearing upon the nature and extent of the conditions

which the Commission should impose in its order of approval so as to provide the "fair and equitable arrangement" to protect the interest of the employees involved contemplated by Section 5(2)(f).

This Court held in *Railway Labor Executives' Ass'n.* v. U. S., 339 U. S. 142, that, under the provisions of Section 5(2)(f), the Commission has the power and authority to impose any conditions in its order of approval that may be justified by the proof in order to provide the fair and equitable arrangement contemplated by the act. In that case there was no evidence of earnings in outside industry, whereas in this case there is specific, detailed evidence showing exactly the loss in pay which would accrue to dismissed employees in Nashville over and above the customary four-year protective period, which was provided for in this instance. Such evidence is of particular significance in this case in view of the fact that the Commission found that there will be no immediate and direct improvement in the service to the public as a result of this merger.

The Commission, therefore, was required to pass upon the exception involved, in view of the provisions of the Federal Administrative Procedure Act, and the District Court should have so held.

It is respectfully insisted that the order of the Commission does not provide for the "fair and equitable arrangement to protect the interests of the railroad employees affected" as required by the act as a condition of approval. This is evident by the fact that the District Court refused to affirm the order as issued by the Commission, but instead, based its approval upon an "express condition" referred to earlier herein.

Since the District Court did not unconditionally approve the order as issued, another serious and important question is presented: whether on review the lower court may attempt to cure a defective order by stating that it is ap-

proved conditionally, or, is the reviewing court limited to sustaining or setting aside such an order (or to remanding the case to the Commission).

We submit that the District Court is without power or or authority under the pertinent provisions of 28 U.S.C. Sections 1336 and 2321-2325 to revise or amend orders of the Commission. Therefore, the lower court erred in not reversing the order, or in not remanding the case to the Commission to afford it an opportunity to correct the defect.

The Court should not exercise administrative functions of the Commission because, as this Court has held, "the function of the reviewing court ends when an error of law is laid bare." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21 (1952). If the Commission were required to consider all of the uncontradicted proof relating to the nature and extent of the adverse effect upon the employees, and then impose conditions for their protection which would be actually fair and equitable based on such uncontradicted proof, the Commission might well determine that the merger should be denied.

Question 3

Whether the District Court may sustain an order of the Commission where it did not have before it at the time the case was decided and therefore did not consider material exhibits to the proceedings which were filed subsequent to the hearing before the Commission pursuant to instructions from the Hearing Examiner.

From the state of the record it is quite clear that the Commission overlooked and did not consider vital and material evidence when disposing of the Exceptions filed by the Employee Association to the Examiner's Proposed Report. The District Court overruled appellants' allega-

tions to this effect in their intervening complaint stating in Conclusion of Law No. 7(d) that the record shows that the Commission did consider the contentions of the employee group and rejected them.

The District Court, however, at no place indicates where in the Commission's Report it is shown that the exception was considered by the Commission.

During the hearing before the Examiner the issue arose as to whether the L. & N.'s cost of repairing and maintaining its diesel locomotives was excessive—being far and above the cost for comparable work performed by the N. C. & St. L. This issue is material and is important in this case because the entire merger has been approved on the apparent theory of savings in money to the carriers, and upon the alleged improvements in service to the public which "should" be brought about "in the long run" from such savings (notwithstanding the affirmative finding of the Commission that there would *not* be any immediate and direct improvement in the service to the public as a result of this merger).

The Commission (and the District Court) accepted and reiterated the Examiner's finding that "Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger." However, the Commission (and the District Court) has completely ignored specific evidence submitted by the applicants' own witnesses showing that there *is* something left to be done which offers opportunity for tremendous savings—*an amount which approximates the entire sum proposed to be saved by firing 550 employees.*

The only operating witness for the carriers was asked to confirm the fact that for the year 1954 (the year preceding the hearing) that the L. & N.'s cost of repairs and maintenance to its diesel locomotives was more than *twice*

that of the N. C. & St. L. based upon their respective costs per diesel unit. The witness did not deny the figures showing this fact, but merely stated that he felt it would be difficult to make a proper comparison on that particular basis, giving his reasons for such statement (R. 396).

This is the testimony which was accepted by the Examiner and the Commission, and is apparently the basis for the District Court's Conclusion of Law No. 7 to the effect that the Commission considered the exception of the Employee Association relative to this point and rejected it. (Sheets 55-56. Examiner's Proposed Report; Sheet 54, Commission's Report.)

It is the *subsequent* testimony of this same witness on further cross-examination by counsel for the Employee Association, and his subsequent testimony on rebuttal, together with his own exhibit on rebuttal which has been completely ignored by the Commission and by the District Court.

Since the witness testified that a comparison of the repair and maintenance costs of the L. & N. and the N. C. & St. L. would be difficult on a diesel unit basis, the witness was asked what would be the proper basis for comparing the efficiency or cost of repairs by two different railroads. In reply, the witness stated the proper basis for comparison would be their respective costs per *diesel locomotive mile* (R. 409-410). Subsequent proof introduced by the Employee Association showed that even on this basis the L. & N.'s costs were still more than *twice* that of the N. C. & St. L.

This same witness, on rebuttal, introduced Exhibit H-62 in an effort to rebut his own earlier testimony and to rebut the proof introduced by the Employee Association referred to above. The first sheet of this exhibit purported to show the respective costs of the two railroads for a five year period, based on the costs per *diesel unit mile*. (A diesel

"unit mile" refers to the operation of only one diesel unit for one mile, whereas a diesel "locomotive mile" refers to the operation of a complete locomotive, regardless of the number of diesel units making up the complete locomotive.)

As originally filed, Exhibit H-62 showed the L.&N.'s cost of repairs per diesel unit mile as being *less* than that of the N. C. & St. L. The exhibit was shown to be in error, however, in that the figures purporting to show the N. C. & St. L. diesel *unit* miles were actually diesel *locomotive* miles, and the exhibit was admittedly incorrect. Applicants were then required to file a revised first sheet of Exhibit H-62 as a late-filed exhibit showing N. C. & St. L. diesel *unit* miles, so that a proper comparison could be made. A revised first sheet of Exhibit H-62 was subsequently prepared and filed, but was not given any consideration as will be hereinafter shown.

The revised first sheet of applicants' Exhibit H-62 shows that the cost of repairs and maintenance on the L. & N. was approximately 47% higher than that of the N. C. & St. L. for a *five year period*, on the basis which applicants' own operating witness stated to be the proper basis for comparison.

Had the L. & N.'s cost of repairs been brought into line with that existing on the N. C. & St. L., it could have saved in 1954, for example, $2,300,000.00—almost exactly equal to the total amount expected to be saved each year by firing 550 employees. No evidence or reason was given by the applicants to show why the L. & N.'s repair costs should be any higher than the N. C. & St. L.'s.

The Examiner's Proposed Report contains no reference whatever to the revised exhibit or the cross-examination of the sponsoring witness by counsel for the Employee Association, or of his testimony on rebuttal, all of which completely changed and discredited his previous testimony, which the Examiner did accept. The Commission's report

likewise contains no reference to the exception of the Employee Association concerning the Examiner's failure in this regard. Instead, the Commission merely repeated verbatim the language used by the Examiner regarding the witness' earlier testimony, and upon which the District Court apparently based its Conclusion of Law No. 7 to the effect that the Commission did consider the exception but rejected it.

That the Commission ignored the testimony and exhibit referred to in the paragraphs next above is further obvious from the following:

a. The Revised First Sheet of Exhibit H-62 was filed as a late-filed exhibit, after the hearing had been concluded.

b. The Examiner made no reference whatever to the revised exhibit or to the testimony of the sponsoring witness on cross-examination by counsel for the Employee Association, or any of his testimony on rebuttal which completely changed and discredited his previous testimony, which the Examiner did refer to in his Proposed Report.

c. The Commission likewise ignored the revised exhibit and the pertinent testimony referred to above in its Report and Order. It merely repeated verbatim the language used by the Examiner, and did not pass upon the exception to the Examiner's failure to consider it.

d. The Secretary of the Commission when certifying the transcript and exhibits for filing in the District Court failed to include the revised first sheet of Exhibit H-62; a motion to dismiss and strike the footnotes contained thereon; the ruling of the Chief of Finance of the Commission sustaining the objection to said footnotes.

e. The Secretary of the Commission acknowledged the incorrectness of his original certification on May 7, 1957, and submitted to counsel for appellants herein a corrected certification and enclosed certified copies of the documents referred to in the subparagraph next above, stating "the

originals of which are now on file and of record in the office of said Commission." (Appellants herein filed an amendment to their intervening complaint, including copies of said documents, which amendment was allowed in open Court without objection. The corrected certification was not received until after the hearing before the District Court, but was promptly filed with the Court, with notice thereof having been given to all parties of record.)

Had this revised exhibit, together with the testimony relative thereto, been considered by the Commission, or by the District Court, it is obvious that they could not have made their respective findings that "Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger."

Since the Report of the Commission does not contain a single reference to the exception of the Employee Association, or of the exhibit and testimony relied upon in support of the exception, it is respectfully submitted that the District Court erred when it held that the Commission considered the exception and rejected it. Furthermore, had it considered it, under the provisions of the Federal Administrative Procedure Act, (28 U.S.C. Section 1007(b)), the Commission was required to pass upon the exception and give a reasonable basis for rejecting it.

Respectfully submitted,

WALTER HARWOOD,
JUDSON HARWOOD,
Attorneys for Luther Thomas Lambert,
Vernon H. Hedgepath,
The NC&StL Railway Employees
Job Protection Association.

Of Counsel:
HARWOOD, BREEDLOVE AND MITTWEDE,
515 Nashville Trust Building,
Nashville, Tennessee.

APPENDIX A

Please see Jurisdictional Statement filed on behalf of appellants, City of Nashville, Tennessee, et al., for:

Findings of Fact and Conclusions of Law of District Court.

Order of District Court.

Order-Bond of District Court.

APPENDIX B

TITLE 5, U. S. Code:

§ 1007. Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record.

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

. . . . . .

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. June 11, 1946, c. 324, § 8, 60 Stat. 242.

TITLE 49, U. S. Code:

National Transportation Policy

Act Sept. 18, 1940, ch. 722, title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12 and 13 of this title, by inserting before part I thereof

(chapter 1 of this title) the following provision entitled 'National Transportation Policy:'

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12 and 13 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act (chapters 1, 8, 12 and 13 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 5. Combinations and consolidations of carriers—Pooling; division of traffic, service, or earnings.

* * * * * * *

Unification, Mergers, and Acquisitions of Control.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management,

and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifica-

tions as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * * * * *

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such trans-

action will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

TITLE 28 U. S. Code:

Section 2323. Duties of Attorney General; interveners

* * * * * * *

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

* * * * * * *